KHENG CHWEE LIAN

v.

WONG TAK THONG

FEDERAL COURT
WAN SULEIMAN FJ
GEORGE SEAH FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 179 OF 1981]
28 JULY 1983

CONTRACT: *Agreement regarding sub-division - Whether voidable - Misrepresentation - Whether fraudulent.*

LAND LAW: *Registration of undivided shares in land - Indefeasibility of title.*

CIVIL PROCEDURE: *Non-joinder of registered transferees - Effect - Jurisdiction against transferees - Specific performance.*

The appeal was from the decision of the High Court declaring the respondent to be the owner of one-half of land in Kuala Trengganu held under KRM 991 and ordering sub-division of the land so that the respondent would retain one-half and the appellant and her five sons the other half, their shares to be adjusted accordingly. In 1954, the appellants and the respondent executed a document called "Surat Perjanjian", ("the first agreement"), following which the respondent went into occupation of the front portion of the land and erected a biscuit factory on it. In 1957, the parties executed another agreement ("the second agreement"), sub-dividing the land, the respondent being given the front portion measuring 90 x 33 feet, which area was stated to be sufficient to accommodate the building on it. In fact it was less than the area already occupied by the biscuit factory. Between 1967 and 1973, the appellant transferred to her five sons undivided shares amounting to about two-thirds of the total area of the land, which transfers were registered, and retaining about one-third. In 1973, the respondent lodged a caveat against one-half share of the land. He took out a writ against the appellant. None of the sons were made co-defendants to the action. At the hearing of the appeal, leave was given to the sons to intervene pursuant to r. 64, Rules of the Federal Court, 1980.

Held:

[1] The second agreement was voidable at the option of the respondent and had been lawfully repudiated. The respondent was induced into signing the second agreement by the misrepresentation regarding the area granted to him, which misrepresentation was fraudulent within the meaning of s. 17(a) & (d), Contracts Act, 1950 (Revised 1974). Where one party induces the other to contract on the faith of representations made to him, anyone of which is untrue, the whole contract is considered as having been obtained fraudulently. (ss. 10 & 13, Contracts Act; *Pertab Chunder Ghose v. Mohendra Purkait* [1888-89] 16 IA 233).

[2] The order of the trial Judge was wholly irregular insofar as it purported to affect the registered title, share and interest of the interveners in the land when they had not been made parties in the proceedings in the Court below. The trial Court had no jurisdiction over any person other than those properly brought before it. (*Ganapathy Chettiar v. Periakaruppa Chettiar & Anor.* [1962] MLJ 207; *Brydges v. Brydges & Wood* [1909] p. 187; *Re Shephared* [1890] 43 Ch D 131; *Coleman v. Coleman* [1920] p. 71).

[3] Therefore that part of the order directing that the respondent should be entitled to one-half of the land should be set aside. Since the appellant was no longer the registered owner of one-half share of the land, it was not possible for the Court to order specific performance in accordance with the terms of the first agreement. On the other hand, ss. 13 and 18(3) of the Specific Relief Act, 1950 (Revised 1974) should have been invoked by the respondent.

[4] The appeal of the interveners must be allowed and new order substituted declaring the respondent beneficial owner of one-half undivided share in the land, and ordering the appellant to transfer to the respondent all the undivided share registered in her name and to pay compensation in respect of the deficiency, the Senior Assistant Registrar to sign the transfer on default by the appellant. (ss. 13 & 18 (3), Specific Relief Act; *Loh Koon Moy & Anor. v. Zaibun binti Syed Ahmad* [1978] 2 MLJ 31).

Cases referred to:
Pertab Chunder Ghose v. Mohendra Purkait [1888-89] 16 IA 233
Ganapathy Chettiar v. Periakaruppan Chettiar & Anor. [1962] MLJ 207
Brydges v. Brydges & Wood [1909] 187
Re Shephared [1890] 43 Ch D 131
Bhup Narian Singh v. Gokhul Chan Mahton [1933 - 34] 61 IA 115
Ong Chat Pang & Ors. v. Valliappa Chettiar [1971] 1 MLJ 224
Loh Koon Moy & Anor. v. Zaibun binti Syed Ahmad [1978] 2 MLJ 31

Legislation referred to:
Contracts Act 1950, ss. 13, 14, 15, 16, 17, (a), (d), 18, 19, 21, 22, 23
National Land Code 1965, s. 340(1)
Rules of the Federal Court 1980, r. 64
Rules of the High Court 1980, O. 45 r. 8
Specific Relief Act 1950, ss. 13, 18(3)

Other sources referred to:
Halsbury's Law of England (4th Edn.,) Vol. 26 p. 237 para. 501, 550

For the appellant - H.S. Lim; M/s. H.S. Lim, Teo & Partners
For the respondent - To'Puan Mehta; M/s. Mehta & Co.

JUDGMENT

George Seah FJ:

This is an appeal from a decision of the High Court at Kuala Trengganu declaring that the plaintiff/respondent is the owner of one-half of the land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under KRM 991 and ordering that the said land be so sub-divided that the respondent should retain the area he now occupies plus

an additional area so as to make up his total holding to be one-half of the entire area of the said land and that the remaining area should go to the defendant/appellant and her five sons whose shares in the said land should therefore be adjusted accordingly.

At all material times the appellant was the registered owner of a parcel of land described as AMT 1, Mukim of Kuala Trengganu. It is common ground that the said land is now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under KRM 991 and contains an area of 1.533 acres, more or less.

On 12 May 1954 the appellant and the respondent executed a document called "Surat Perjanjian". The signature of the appellant was witnessed by her son, Soon Hup Cheng and that of the respondent by Poh Yin Chun. Following the signing of this agreement the respondent went into occupation of the front portion of the said land facing the main road and erected a biscuit factory thereon with the knowledge and consent of the appellant. The respondent has had been in occupation of this portion of the said land ever since.

It was the case of the respondent that by the agreement of 12 May 1954 (hereinafter referred to as "the first agreement") the appellant had agreed to sell to the respondent one-half share in the said land for the sum of RM1,775 (Dollars one thousand seven hundred and seventy five only) and this amount was duly received by the appellant. The appellant's case was that the transaction was in fact a friendly loan made up of RM1,500 as principal, RM270 as agreed interest and RM5 as petition-writer's fee and that the respondent misrepresented and induced her into signing the agreement on the representation that the security for the loan should be in the form of a sale agreement. The learned Judge accepted the version related by the respondent and rightly pointed out that under the term of the first agreement the transaction was a *jual putus* and that the purchase price of RM1,775 was *jelas* or settled. There was no appeal by the appellant against the conclusion reached by the learned Judge.

Next, on 23 October 1957 the appellant and the respondent purported to execute another document (hereinafter referred to as "the second agreement") in Bahasa Malaysia and the relevant parts of the English translation certified by a Court Interpreter read as follows:

1. The First Party is the owner of a piece of land known as A.M.T. 1, Mukim of Kuala Trengganu at around Balek Bukit. On 12 May 1954 the First Party entered into an agreement with the Second Party selling half (½) share of the said land to the Second Party.

2. Whereas the Second Party is in need of the land and it was found to be too narrow to be subdivided lengthwise and therefore it is not possible for both parties to use the land to build houses. While both parties were discussing the Second Party chose the front portion near the road as the Second Party urgently needed the said portion.

3. The Second Party agree to accept the said half share of the land facing the main road with an area of thirty-three by ninety feet (90 x 33) enough to accommodate the building only and the Second Party agree to give back to the First party the back portion measuring 90 x 33 feet without any reimbursement.

4. The First Party acknowledged the renunciation of the front portion of the land measuring 90 x 33 feet to the Second Party and the acceptance of the back portion of the land measuring 90 x 33 feet.

The appellant's case was that this second agreement cancelled and replaced the first agreement and that the respondent was only entitled to an area measuring 90 x 33 feet and not to one-half share of the said land. The case of the respondent was that he was induced by fraudulent misrepresentation into signing the second agreement. Alternatively, it was contended that the second agreement was never intended as a cancellation and/or replacement of the first agreement.

Having considered the conflicting testimonies given by the appellant and her witnesses and that of the respondent the learned Judge said:

> In the circumstances I accept that the plaintiff (respondent) was tricked or misled into signing the second agreement by Soon Hup Cheng (DW3) the defendant (appellant)'s son. The plaintiff was not aware that he was giving up his bigger share in the land in return for a ridiculously small area, which is not even enough to accommodate his existing factory. It is noted that the original size of the factory was 94 x 38 feet, and with the extension (*vide* amended plan dated 7 September 1957) its size became enlarged to 102 x 38 feet. Yet the area purported to have been accepted by the plaintiff was only 90 x 33 feet which means that part of factory is occupying areas not owned by him. I can't accept this as a deal which a reasonable man like the plaintiff, a fairly successful businessman, would accept. Why should he when there was absolutely no rhyme or reason for him to do so?

The learned Judge rejected the testimony of the petition-writer, Wan Mohd. bin Endut (DW1) that he explained the contents of the second agreement to both the appellant and the respondent and that both signed in his presence, when the petition-writer could not give a satisfactory explanation how he could remember so vividly this particular incident which happened about 25 years ago.

Now, two or more persons are said to consent when they agree upon the same thing in the same sense (s. 13 of the Contracts Act 1950) and consent is said to be free when it is not caused by:

(a) coercion, as defined in s. 15;

(b) undue influence, as defined in s. 16;

(c) fraud, as defined in s. 17;

(d) misrepresentation, as defined in s. 18; and

(e) mistake, subject to s. 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake (s. 14). "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(i) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(ii) the active concealment of a fact by one having knowledge of belief of the fact;

(iii) a promise made without any intention of performing it;

(iv) any other act fitted to deceive; and

(v) any such act or omission as the law specially declares to be fraudulent (s. 17).

"Misrepresentation" includes:

(i) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(ii) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(iii) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement (s. 18).

In the case of *Pertab Chunder Ghose v. Mohendra Purkait* [1888-89] 16 IA 233, Sir Richard Couch in giving the judgment of the Privy Council said at p. 237:

> Where one party induces the other to contract on the faith of representations made to him, anyone of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently ...

Under para. 3 of the second agreement there was clear misrepresentation of fact that the existing biscuit factory was only occupying an area containing 90 x 33 feet when in actual fact, the area occupied by the respondent at the relevant time was 94 x 38 feet. And on 7 September 1957 the respondent had submitted an amended building plan to the Town Council applying for permission to extend the length of his factory by another 8 feet to provide for living quarters for his family. In other words, by September 1957 the respondent knew for a fact that the overall length of his biscuit factory would be 102 feet. Applying the principle enunciated in *Pertab Chunder Ghose* case to the facts of this case, we agree with the finding of the learned Judge that the respondent was induced by misrepresentation into signing the second agreement and in our view, the misrepresentation was fraudulent within the meaning of s. 17(a) and (d) of the Contracts Act 1950 (Revised 1974). It follows as a collorary that the respondent did not consent to the execution of the second agreement within the meaning of s. 13 thereof. By virtue of the provision of s. 19 of the Act the second agreement was voidable at the option of the respondent, and the learned Judge was right in holding that, on the pleading, it had been lawfully repudiated by the respondent. We are reminded of the principle that the greatest respect should be paid to the findings of fact of a Judge of first instance, based on seeing and hearing the witnesses and forming an estimate of their credibility. Since learned Counsel for the appellant has been unable to show that the learned Judge in the Court below had erred in any way, we do not wish to disturb his findings on this point.

Having disposed of the second agreement we come now to deal with the main substance of this appeal. It was not in dispute that after the execution of the first agreement and following the issue of the land title of Lot 2080, Mukim Chabang Tiga, Kuala Trengganu

held under K.R.M. 991 the appellant had on various dates subsequent thereto transferred to her five sons undivided shares amounting to about two-thirds of the total area of the said land, full particulars of which are as follows:

a) On 14 May 1967 to Soon Hup Soon - 924/6677648)

b) On 14 May 1967 to Soon Hup Liam - 924/6677648) RM1,000

c) On 21 April 1968 to Soon Hup Liong - 1848/6677648) RM2,000

d) On 15 March 1973 to Soon Hup Cheng - 2224651/6677648)

e) On 15 March 1973 to Soon Hup Seng - 2224651/6677648) - RM15,000

As a result of these transfers the appellant is presently the registered owner of 2224560/6677648 undivided shares in the said land. In short, the appellant now owns approximately one-third undivided share in Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under KRM 991. On 25 April 1973 the respondent, having discovered these transfers, lodged a caveat against one-half share of the said land, and instructed Counsel to take out a writ against the appellant without making any of the five sons of the appellant as co-defendants to the action. At the hearing of this appeal leave was given to all the five sons to intervene pursuant to r. 64 of the Rules of the Federal Court 1980 and they are represented by learned Counsel who also appears for the appellant. It was submitted on behalf of the interveners that the order of the learned Judge clearly affected their registered title share and interest in the said land and under s. 340(1) of the National Land Code 1965 their title share and interest shall be deemed to be indefeasible. As interested parties it was argued that the interveners had been denied a hearing and an order so made was held to be wholly irregular (*Ganapathy Chettiar v. Periakaruppan Chettiar & Anor.* [1962] MLJ 207).

In our judgment, the Court, below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (*Brydges v. Brydges & Wood* [1909] p. 187; *Re Shephared* [1890] 43 Ch D 131 and *Coleman v. Coleman* [1920] p. 71). The terms "judgment" and "order" in the widest sense may be said to include any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court [see para. 501 of *Halsbury's Laws of England* (4th Edn.,) Vol., 26 at p. 237]. and at para. 550 the following passage appears:

> Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences.

We are constrained to agree with the submission of learned Counsel for the interveners that the order of the learned Judge was wholly irregular insofar as it purports to affect the registered title, share and interest of the said interveners in the said land when they had not been made parties or given a full opportunity of taking part in the proceedings in the Court below. If the respondent had wanted the whole one-half share in the said land in pursuance of the first agreement after knowledge of the registration of these transfers by the appellant to her five sons, he ought to have joined the sons

and particularly Soon Hup Cheng as co-defendants in the proceeding. Since all these transfers were made by the appellant subsequent to the signing of the first agreement, the onus of proof would be on them to show that they were *bona fide* purchasers for value without notice of the first agreement on the authorities of *Bhup Narian Singh v. Gokhul Chan Mahton* [1933-34] 61 IA 115 and *Ong Chat Pang & Ors. v. Valliappa Chettiar* [1971] 1 MLJ 224. The respondent, however, did not adopt this course of action. For the reasons given above we set aside that part of the order of the learned Judge directing that the respondent should be entitled to one-half of the entire area of the said land now known as Lot 2090, Mukim Chabang Tiga, Kuala Trengganu held under K.R.M. 991. Since the appellant was no longer the registered owner of one-half share of the said land it was not possible for the Court to order specific performance in accordance with the term of the first agreement. In our opinion, learned Counsel for the respondent ought to have drawn the attention of the learned Judge to the provisions of s. 13 and 18(3) of the Specific Relief Act 1950 (Revised 1974). Section 13 reads:

> Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

And s. 18(3) is as follows:

> If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

In our judgment, either s. 13 or s. 18(3) may properly be invoked to the facts of this case. For this reason we allow the appeal of the interveners and substitute the undermentioned order in place of that made by the learned Judge in the Court below, *viz:*

A declaration that the plaintiff/respondent was the beneficial owner of one-half share or 3338824/6677648 undivided shares in the said land now known as Lot 2080, Mukim Chabang Tiga, Kuala Trengganu held under KRM 991 containing an area of 1.533 acres, more or less and ordering the defendant/appellant to transfer to the plaintiff/respondent all the 2224650/6677648 undivided shares now registered in her name within thirty days from date hereof and further ordering the defendant/appellant to pay compensation to the plaintiff/respondent in respect of the deficiency, *viz.* 1114174/6677648 undivided shares. It is further ordered that if the amount of compensation payable cannot be agreed upon between the parties it is directed it be assessed by a Senior Assistant Registrar. And if the defendant/appellant defaults in executing a registrable memorandum of transfer within the specified time it is ordered that the Senior Assistant Registrar attached to the High Court in Malaya at Kota Bharu, Kelantan, be empowered to sign the transfer on her behalf (*Loh Koon Moy & Anor. v. Zaibun binti Syed Ahmad* [1978] 2 MLJ at p. 31 and O. 45 r. 8 of the Rules of the High Court 1980).

As regards costs it is ordered that the appellant shall pay to the respondent one-half of the taxed costs here and in the Court below. The Court deposit to be paid to the respondent on account of taxed costs. We make no order with regard to the costs of the interveners in this appeal.

Also found at [1983] 2 CLJ 191